OCT 17 1955

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 366

HAM SAY NAIM, *Appellant,*

vs.

RUBY ELAINE NAIM, *Appellee*

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

DAVID CARLINER,
Warner Building,
Washington, D. C.,
Attorney for Appellant.

HERBERT MONTE LEVY,
American Civil Liberties Union;
WILL MASLOW,
American Jewish Congress;
ARTHUR LAZARUS AND RICHARD SCHIFTER,
Association on American Indian Affairs;
JACK WASSERMAN,
Association of Immigration and Nationality Lawyers;
FRANK CHUMAN AND EDWARD REISS,
Japanese-American Citizens League;
ANDREW REISS,
FRED T. STANT, JR.,
ALAN S. MEHMAN,
Of Counsel.

CITATIONS

	Page
Bolling v. *Sharpe*, 347 U. S. 497, 499	4
Buchanan v. *Warley*, 245 U. S. 60	2
Hirabayashi v. *United States*, 320 U. S. 81, 100	4
Jackson v. *State*, 260 Ala. 698, 72 So. 2d 116, cert. denied 348 U. S. 888	2
Korematsu v. *United States*, 323 U. S. 214, 217	4
Maynard v. *Hill*, 125 U. S. 190, 205	1, 2
Meyer v. *Nebraska*, 262 U. S. 390	4
Oyama v. *California*, 332 U. S. 633, 646	4
Pace v. *Alabama*, 106 U. S. 583	2
Reynolds v. *United States*, 98 U. S. 145, 165	2
Rule 16(b) and (c), Revised Rules of the Supreme Court	1
Senate Bill 219, Senate Bills, Virginia Senate, 1924	3
Sherrer v. *Sherrer*, 334 U. S. 343, 354	2
Wood v. *Commonwealth*, 159 Va. 963, 965, 166 S. E. 477	3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 366

HAM SAY NAIM, *Appellant,*

vs.

RUBY ELAINE NAIM, *Appellee*

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

The questions posed by this appeal, the appellee says, are so unsubstantial that they need no further argument before this Court, and she has rested her motion to dismiss, or in the alternative, to affirm the decree below, upon that sole ground. (Rule 16(b) and (c), Revised Rules of the Supreme Court.)

Not without irony, the appellee relies, in part,[1] upon three decisions of this Court which declare that marriage creates "the most important relation in life",[2] that it results

---

[1] Appellee's Statement, Page 5.

[2] *Maynard* v. *Hill,* 125 U. S. 190, 205.

in "social relations and social obligations and duties, with which government is necessarily required to deal",[3] and that it "involves the exercise by the States of powers of the most vital importance".[4]

Moreover, the appellee concedes[5] that this Court has never before passed upon the validity of the statutes which seek to interfere with marriage because the spouses are persons of different races.

Two reasons are given by the appellee in support of her argument that the questions posed here are not substantial. One is that "the unbroken line of cases beginning in 1869, the very year after the Fourteenth Amendment was adopted, and continuing through 1954 clearly emasculate the appellant's contention" (that the statute is unconstitutional on its face). (Appellee's Statement, Page 10).

Whatever unbroken line of cases there may be were not cited by the appellee. On the contrary, the six decisions of this Court relied upon by the appellee, *supra*, indicate, first, that the questions posed in this appeal have not been decided by the United States Supreme Court, and second, that the determination of the constitutional power of a state to dissolve marriages does, in fact, pose a substantial federal question. In *Maynard* v. *Hill*, the dissolution of the marriage was tested against the constitutional prohibition forbidding impairment of contracts. In *Reynolds* v. *United States*, the issue was whether a polygamous marriage was protected by the constitutional guaranty of religious freedom. *Sherrer* v. *Sherrer* involved the effect of the full faith and credit clause upon proceedings to determine marital status.

---

[3] *Reynolds* v. *United States*, 98 U. S. 145, 165.

[4] *Sherrer* v. *Sherrer*, 334 U. S. 343, 354.

[5] Appellee's Statement, pp. 7, 8, citing *Pace* v. *Alabama*, 106 U. S. 583; *Buchanan* v. *Warley*, 245 U. S. 60, and *Jackson* v. *State*, 260 Ala. 698, 72 So. 2d 116, cert. denied, 348 U. S. 886.

For the first time in the constitutional history of the United States, the present appeal poses the question whether the equal protection and due process clauses of the Fourteenth Amendment inhibit the power of a state to dissolve a marriage upon the sole ground of the races of the spouses.

This Court has held that a state may not deny by reason of race the rights of its residents to follow ordinary occupations, to serve on petit or grand juries, to buy, sell, or occupy real property, to vote in primary as well as general elections, or to attend public schools.

Whether a marriage, "the most important relation in life", can be dissolved by a state because one spouse is Caucasian and the other is Chinese [6] manifestly poses a question at least equal in substance to the foregoing issues. In the context of these decisions by the Supreme Court, it denies reality to say that the question raised in this appeal is unsubstantial.

The second reason relied upon by the appellee is that in this appeal "the critical issue is the reasonableness of the legislative classification and the necessity for regulation", and that in the absence of evidence or facts within the judicial notice of the Court to challenge the classification, this Court should not "intervene in the present case". (Par. 4, Appellee's Statement).

The basic flaw in the appellee's argument is that it has by-passed the question of the state's power to act at all in the field of preserving the racial integrity of the white race. The question is not whether the classifications adopted within the "Act to Preserve Racial Integrity" are arbi-

---

[6] It should be noted that the purpose of the statute requiring such dissolutions is to "preserve the integrity of the white race", (See Senate Bill 219, Senate Bills, Virginia Senate, 1924; *Wood* v. *Commonwealth*, 159 Va. 963, 965, 166 S. E. 477) and "to regulate the marriage relation so that it (the State) shall not have a mongrel breed of citizens". (See Opinion below, Statement as to Jurisdiction, Page 24.)

trary or without a reasonable relation to the purpose of the statute. The question rather is whether the purpose is within the competency of the state to effect. *Meyer* v. *Nebraska*, 262 U. S. 390, 399. The appellee's reasoning presupposes the validity of the purpose of the statute. *Oyama* v. *California*, 332 U. S. 633, 646.

The Court below did not fail to treat both issues. It explicitly upheld the validity of the purpose of the statute:

> "If the prevention of miscegenetic marriages is a proper governmental objective, and within the competency of the state to effect, which we hold it to be, then Section 20-54 of the Code, supra, under attack, is a valid enactment unless classification made by the statute is arbitrary and without reasonable relation to the purpose intended to be effected" (Statement as to Jurisdiction, Page 23).

The critical issue in this appeal, therefore, is whether the Court below is correct in holding that the "prevention of miscegenetic marriages is a proper governmental objective and within the competency of the state to effect".

Nor is the appellee correct in her assumption that the burden is upon the appellant to show that the racial classifications adopted by the statute are unreasonable. The decisions of this Court in *Hirabayashi* v. *United States*, 320 U. S. 81, 100, 101; *Korematsu* v. *United States*, 323 U. S. 214, 217; *Oyama* v. *California*, *supra*, and *Bolling* v. *Sharpe*, 347 U. S. 497, 499, have declared that racial distinctions are irrelevant, unjustified, inexcusable, odious, and constitutionally suspect, and that a pressing public necessity or exceptional circumstances must be shown to justify them. Obviously, the burden of showing such a necessity is upon those who seek to justify the racial distinctions.

Inasmuch as that burden has not been met by the appellee, her motion to dismiss the appeal or, in the alternative, to affirm the decree below, should be denied.

Respectfully submitted,

DAVID CARLINER,
Attorney for Appellant.

HERBERT MONTE LEVY,
American Civil Liberties Union;
WILL MASLOW,
American Jewish Congress;
ARTHUR LAZARUS AND RICHARD SCHIFTER,
Association on American Indian Affairs;
JACK WASSERMAN,
Association of Immigration and Nationality Lawyers;
FRANK CHUMAN AND EDWARD ENNIS,
Japanese-American Citizens League;
ANDREW REINER,
FRED T. STANT, JR.,
ALAN S. MIRMAN,
Of Counsel.

Proof of Service

I, David Carliner, attorney for Ham Say Naim, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of October, 1955, I served a copy of the foregoing Brief in Opposition to Appellee's Motion to Dismiss or Affirm on Ruby Elaine Naim, appellee herein, as follows:

By mailing a copy, in a duly addressed envelope, with postage paid to A. A. Bangel, Esq., her attorney of record, at his office at Law Building, Portsmouth, Virginia.

DAVID CARLINER,
Attorney for Appellant,
902 Warner Building,
Washington 4, D. C.

(4633-4)